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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

PARTIES TO THE PROCEEDINGS

The United States Environmental Protection Agency is the petitioner in this Court and was a respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: Defenders of Wildlife, Center for Biological Diversity, and Craig Miller.

The following parties are respondents in this Court and were intervenors in the court of appeals: National Association of Home Builders, State of Arizona, and Arizona Chamber of Commerce.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-67a) is reported at 420 F.3d 946.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. Petitions for rehearing were denied on June 8, 2006 (App. 68a-69a). On August 30, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 6, 2006. On September 27, 2006, Justice Kennedy further extended the time to and including October 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7(a)-(b) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)-(b), and Section 402(b) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1342(b), are reproduced in the appendix to this petition (App. 117a-124a).

STATEMENT

1. The Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. 1251(a)). Under the CWA, the National Pollutant Discharge Elimination System (NPDES) is administered by EPA unless and until authority to administer the program within a particular State is transferred to state officials. The Act provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). The CWA further states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9). Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978). After NPDES permitting authority has been transferred to state officials, EPA can object to a state-issued permit only if it is "outside the guidelines and requirements" of the CWA. 33 U.S.C. 1342(d)(2).

2. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress

directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. IV 2004). The Fish and Wildlife Service (FWS) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Section 7(b)(3)(A) states that, once the consultation process has been completed, "the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. 1536(b)(3)(A). Section 7(b)(3)(A) further provides that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [Section 7] and can be taken by the Federal agency * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A).

Regulations promulgated jointly by the Secretaries of Commerce and the Interior furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). *Inter alia*, the regulations establish a process of "formal consultation," see 50 C.F.R. 402.14, which culminates in the issuance of a biological opinion (BiOp), see 50 C.F.R. 402.14(h), that includes a "detailed discussion of the effects of the action on listed species or critical habitat," 50 C.F.R. 402.14(h)(2). The

term "effects of the action" is defined to include "indirect effects," *i.e.*, "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. 402.02. The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

3. In January 2002, Arizona officials requested EPA's authorization to administer the NPDES program in that State. App. 7a. In June 2002, EPA announced that it had initiated consultation with FWS pursuant to Section 7(a)(2) of the ESA. See 67 Fed. Reg. 49,919 (2002). During the consultation process, FWS staff expressed concern that the transfer of NPDES authority might have indirect effects on species listed under the ESA. That concern was grounded in the fact that, whereas EPA itself would be required by Section 7(a)(2) to consult with FWS in order to assess the likely effects on listed species of individual permitting decisions under the CWA, Arizona officials would be under no similar obligation, since Section 7(a)(2) of the ESA applies only to federal agency action. See C.A. App. 116-117.[1]

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[1] The focus of FWS field staff's concern was not that discharges permitted by the State after a transfer of authority would cause adverse impacts on water quality that in turn would jeopardize listed species. FWS agreed with EPA that the proposed transfer of authority was unlikely to have that effect. Rather, FWS field staff's concern was that the development associated with such discharges might harm certain terrestrial species. Because large-scale development could not as a practical matter go forward without CWA discharge permits, EPA in its own administration of the CWA would treat the impacts of associated development as impacts of the relevant CWA permits. EPA staff pointed out, however, that if authority over the NPDES program in Arizona was transferred to state officials, EPA would lack the power to object to state permits based on such *non*-water-quality-related impacts on listed species. EPA further stated that the transfer of authority could not properly be regarded as the cause of adverse impacts to terrestrial species, both because the link between the two is speculative and attenuated as a factual matter, and because the CWA directs EPA to approve a State's application to assume administration of the NPDES program if the criteria in Section 402(b) of the CWA are met. FWS staff, by contrast, took the position that the consultation

On December 3, 2002, FWS issued its BiOp, which concluded that the requested transfer of NPDES permitting authority would not cause jeopardy to listed species. C.A. App. 204-231. FWS stated that, "[a]fter further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action." *Id.* at 223. FWS explained, *inter alia*, that the

> loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Id. at 224. FWS also concluded that, even if the effects of the transfer on listed species could properly be attributed to EPA, other mechanisms were sufficient to support the conclusion that the transfer of NPDES permitting authority was not likely to jeopardize a listed species or adversely modify critical habitat. See *id.* at 217-221.

After FWS issued the BiOp, EPA approved the transfer of permitting authority to Arizona. C.A. App. 232; see 67 Fed. Reg. at 79,629. EPA found that Arizona's application met each of the criteria for program approval specified in Section 402(b) of the CWA. C.A. App. 258.

4. Defenders of Wildlife and other organizations filed a petition for review in the court of appeals, contending that EPA had acted arbitrarily and capriciously by approving Arizona's

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process must include an assessment of indirect effects that FWS believed the transfer would have on terrestrial species. C.A. App. 117. Pursuant to procedures set forth in a pre-existing Memorandum of Agreement, that interagency dispute was elevated for resolution at higher levels within the agencies. See *id.* at 116.

request for authority to administer the NPDES program. The court of appeals granted the petition for review. App. 1a-67a.

a. The court of appeals first held that EPA's approval of Arizona's transfer application was arbitrary and capricious because EPA had "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." App. 23a; see App. 23a-28a. The court explained that, although EPA had construed Section 7 of the ESA as requiring it to consult with FWS concerning the effect on listed species of the proposed transfer of permitting authority, FWS's no-jeopardy opinion was based in part on the premise that EPA cannot deny a transfer application under Section 402(b) of the CWA based on ESA concerns if the CWA criteria are satisfied. See App. 23a-26a. The court concluded that EPA's approval of the transfer application "was not the result of reasoned decision-making" because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true." App. 26a-26a. The court stated that it was therefore required to "remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." App. 28a.

b. Rather than, in fact, remanding the case on that ground, however, the court of appeals went on to hold that EPA had both the power and the duty under the ESA to determine whether transfer of NPDES permitting authority to state officials would jeopardize listed species, and to deny a transfer application if it found jeopardy to be likely, even though it is undisputed in this case that the State of Arizona had satisfied the criteria (see 33 U.S.C. 1342(b)(1)-(9)) that trigger the requirement in 33 U.S.C. 1342(b) that EPA "shall" approve a State's transfer application. App. 28a-48a; see App. 31a n.11. That holding was grounded in the court's view that Section 7 of the ESA provides an

"affirmative grant of authority to attend to protection of listed species," over and above whatever obligations federal agencies may have under their own governing statutes. App. 34a; see App. 38a-39a. The court found that authority to be unaffected by the CWA's directive that EPA "shall approve" state applications that satisfy the criteria set forth in 33 U.S.C. 1342(b). See App. 40a. The court of appeals also rejected the contention, advanced by non-federal parties who had intervened in support of EPA, that EPA's approval of the State's transfer application was not subject to Section 7 of the ESA because it was not a "discretionary" action within the meaning of 50 C.F.R. 402.03. See App. 40a-44a. The court construed that regulation's reference to "discretionary" action to encompass all agency actions that are "authorized, funded, or carried out" by the agency. App. 43a (quoting 16 U.S.C. 1536(a)(2)).[2]

The court of appeals acknowledged that its conclusion that Section 7(a)(2)'s obligations are triggered in this case even though Section 402(b) of the CWA mandates approval of a transfer application conflicts with decisions of two other courts of appeals. See App. 44a-47a (citing *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998), and *Platte River Whooping Crane Habitat Maint. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992)). The court believed, however, that its holding was supported by Ninth Circuit precedent and decisions of two other courts of appeals. App. 42a-43a, 44a-46a, 47a-48a.[3]

c. Judge Thompson dissented, relying on 50 C.F.R. 402.03 and on an array of Ninth Circuit precedents holding that Section

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[2] The court of appeals reached that conclusion on an important question of law despite the government's repeated request to have the opportunity for additional briefing on the question should the court, contrary to the suggestion of the government, decide to reach the issue. See App. 43a n.19.

[3] The court of appeals also held that the other bases for FWS's no-jeopardy conclusion did not adequately support EPA's decision to approve the transfer of permitting authority. App. 48a-61a.

7(a)(2) of the ESA does not encompass agency conduct as to which the agency lacks discretion. See App. 63a-67a. Judge Thompson explained:

> Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act. The Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions.

App. 65a-66a. Judge Thompson concluded that, because "[t]he EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary," the petition for review should be denied. App. 67a.

d. The court of appeals denied rehearing and rehearing en banc, with six judges dissenting. App. 68a. Judge Kozinski, writing for the dissenting judges, observed that, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." App. 78a n.4. The dissenting judges also explained that the Ninth Circuit's decision conflicts with rulings of two other courts of appeals, which have held that the ESA does not expand the powers of federal agencies or supersede contrary statutory mandates, but simply directs agencies' exercise of existing discretionary authority. See App. 79a-81a (citing *American Forest & Paper Ass'n* v. *EPA*, *supra*, and *Platte River Whooping Crane Trust* v. *FERC*, *supra*).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA can operate to preclude agency conduct that is mandated by another Act of Congress. The Ninth Circuit answered that question in the affirmative, holding that EPA's approval of Arizona's application for transfer of NPDES authority violated Section 7(a)(2), even though the CWA provides that EPA "shall approve" a transfer application when specified criteria are met, and it was undisputed that those CWA criteria were satisfied here. That ruling is erroneous. Moreover, as both the majority and dissenting judges recognized, the Ninth Circuit's ruling conflicts with decisions of two other courts of appeals, which have properly construed Section 7(a)(2) of the ESA as channeling federal agencies' exercise of their existing discretionary authority, but not as superseding constraints or overriding mandates imposed by other laws. And because Section 7(a)(2) applies to *all* federal agencies, the court of appeals' decision has government-wide significance. Review by this Court is warranted in light of the erroneous nature of the court of appeals' ruling; the square conflict with decisions of other circuits, including in this specific context; and the practical importance of the question presented for all manner of government actors.

1. Section 402(b) of the CWA states in unqualified terms that EPA "shall approve" a State's application to administer the NPDES program "unless" the State fails to satisfy one or more of the nine criteria set forth in the CWA itself. 33 U.S.C. 1342(b); see App. 82a (Kleinfeld, J., dissenting from denial of rehearing en banc) ("The 'shall/unless' formula makes the nine conditions exclusive."). In the instant case, "[n]o party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors." App. 31a n.11. The court of appeals nevertheless set aside EPA's approval of Arizona's transfer

application, holding that "Section 7(a)(2) [of the ESA] imposes a duty on the EPA to 'insure' its transfer decision is not likely to jeopardize protected species or adversely modify their habitat," and that EPA had failed adequately to perform that duty. App. 48a; see App. 61a-63a. In practical effect, the court treated Section 7(a)(2) of the ESA as impliedly repealing the CWA's directive that EPA "shall approve" a state transfer application that satisfies the CWA criteria and as effectively imposing a tenth criterion. See App. 78a n.4 (Kozinski, J., dissenting from denial of rehearing en banc).

That holding is erroneous. As this Court has repeatedly recognized, "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted). For the reasons that follow, Section 7(a)(2)'s no-jeopardy and consultation requirements are properly construed to channel the exercise of federal agencies' *existing* discretionary authority, not to override other federal mandates or to require species-protective measures that are forbidden by other federal laws. That reading is particularly appropriate because it avoids unnecessary conflicts between the ESA and other Acts of Congress. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). If Section 7(a)(2) is construed in that manner, its no-jeopardy and consultation requirements are fully consistent with the CWA's directive that EPA "shall approve" any state NPDES transfer application that satisfies the nine specified CWA criteria.

a. Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C.

1536(a)(2). Section 7(a)(2) thus does not impose upon federal agencies any affirmative duty to protect listed species from harms caused by other actors, such as a state permittee. Rather, a federal agency's duty under that provision is simply to ensure that the species is not jeopardized by actions attributable to the agency itself. Where (as here) the conduct that is alleged to cause harm to species is mandated by an Act of Congress, the effect is not properly attributed to the federal agency that simply carries out the statutory directive.

The gravamen of respondents' challenge to the transfer of NPDES authority is that Arizona's permitting regime may be less protective of listed species than is the NPDES program as administered by EPA officials because the State's individual permitting decisions will not be federal agency actions and therefore will not be subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. Acceptance of that position would frustrate Congress's federalism-sensitive judgment to transfer authority to States once the nine criteria are met. And it is clearly that congressional judgment, not any discretionary agency action, that would be the cause of any adverse impact that the transfer might entail.

As FWS explained in its BiOp in this case, any harm to listed species that may result from the challenged transfer is "not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of [Section] 402(b) of the Clean Water Act." C.A. App. 224. FWS thus correctly recognized that Congress's decision to enact the mandatory directive contained in 33 U.S.C. 1342(b), rather than EPA's compliance with that statutory command, is the legal cause of any harm to listed species that the transfer of NPDES permitting authority may entail. FWS

regulations implementing the ESA make clear that an agency is required to take into account only those effects that are "caused" by its actions. See C.A. App. 222-223 (citing 50 C.F.R. 402.02 (defining "indirect effects" as those that are both "caused" by the proposed action and "are later in time, but still are reasonably certain to occur")).

The causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). The Court in *Public Citizen* held that the National Environmental Policy Act (NEPA) did not require the Federal Motor Carrier Safety Administration (FMCSA) to prepare an Environmental Impact Statement (EIS) assessing the environmental effects of allowing Mexican trucks onto United States roads once the President lifted a prior moratorium on Mexican trucks. The Court explained that "NEPA requires a reasonably close causal relationship between the environmental effect" and the pertinent agency conduct before an EIS must be prepared. *Id.* at 767 (internal quotation marks omitted). The Court further observed that

> FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable * * * requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

Id. at 758-759 (citation and internal quotation marks omitted). In those circumstances, the Court reasoned, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.* at 769.

Thus, the Court in *Public Citizen* concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The same principle applies here. Because the CWA forecloses EPA's ability to deny a State's transfer application based on projections of injury to listed species, EPA is not the legal cause of any such harm that may result from activities that are authorized by NPDES permits issued by the State of Arizona after the transfer occurs. Instead, the legally relevant cause is the action of "Congress in * * * limiting [EPA's] discretion," *Public Citizen*, 541 U.S. at 769, by mandating approval of a transfer application that satisfies the criteria in Section 402(b) of the CWA. The agency's approval of Arizona's transfer application therefore cannot properly be said to "jeopardize"—*i.e.*, *cause* jeopardy to—the continued existence of any listed species.[4]

b. Other provisions of the ESA reinforce the conclusion that Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements do not apply to agency conduct that is mandated by another federal statute. Section 2(c) of the ESA reflects Congress's policy judgment that all federal agencies "shall *utilize their authorities* in furtherance of" the statute's purposes. 16 U.S.C. 1531(c)(1) (emphasis added). Section 7(a)(1) similarly provides that agencies "shall * * * *utilize their authorities* in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species." 16 U.S.C. 1536(a)(1) (emphasis added). And Section 7(b)(3)(A), which governs the inter-agency consultation process, states that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he

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[4] Alternatively, EPA's lack of discretion in this area might support a conclusion that EPA's approval of a State's transfer application in accordance with the CWA's command is not an "agency action" within the meaning of Section 7(a)(2) of the ESA. See App. 65a (Thompson, J., dissenting).

believes would not violate [Section 7(a)(2)] and *can be taken by the Federal agency* * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A) (emphasis added).[5] The italicized language in each of those provisions reflects Congress's intent that federal agencies' efforts to prevent harm to listed species must be undertaken in conformity with any constraints imposed by other laws.

The court of appeals appeared to recognize that the phrase "utilize their authorities," where it appears in the ESA, reflects Congress's intent that federal agencies should pursue the ESA's objectives only to the extent that they are permitted to do so by other provisions of law. See App. 34a-35a, 46a. The court concluded, however, that because Section 7(a)(2) itself does not contain that phrase or similar limiting language, Section 7(a)(2)'s no-jeopardy mandate supersedes mandatory directives contained in other Acts of Congress. See *ibid.* That conclusion reflects a misunderstanding of the ESA's history.

As originally enacted in 1973, Section 7 of the ESA directed all federal agencies to

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species and threatened species * * * and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species.

ESA, Pub. L. No. 93-205, 87 Stat. 892 (16 U.S.C. 1536 (1976)). As its text just quoted makes clear, in Section 7's original form, the obligations of federal agencies to carry out conservation

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[5] Accord 50 C.F.R. 402.02 (defining reasonable and prudent alternatives as alternatives that, *inter alia*, "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction").

programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." Consistent with that limitation, Representative Dingell, the floor manager of the bill in the House of Representatives, explained that the ESA as originally enacted "substantially amplified the obligation of * * * agencies * * * to take steps *within their power* to carry out the purposes of this act." 119 Cong. Rec. 42,913 (1973) (emphasis added). This Court quoted that very statement by Representative Dingell in its seminal ESA decision in *TVA* v. *Hill*, 437 U.S. 153, 183 (1978).

Through amendments enacted in 1978, Section 7 of the ESA was divided into subsections. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752. Subsection (a) of Section 7, as enacted in those 1978 amendments, contained in two separate sentences substantially the same language as is now set forth in current Subsections 7(a)(1) and (2). As amended in 1978, Section 7(a) provided as follows:

> Consultation.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of [the ESA]. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency' action) does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to

> be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

1978 Amendments, § 3, 92 Stat. 3752.

The Conference Report accompanying the 1978 amendments explained that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, while the no-jeopardy and ancillary consultation requirements were set forth in a separate sentence that did not repeat the phrase "utilize their authorities" contained in the preceding sentence, the 1978 legislative history indicates that Congress in rewording Section 7 did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far-reaching ways, but rather intended to preserve the substance of the requirements in their prior form. Indeed, the court of appeals in this case recognized that "[t]he 1978 amendment did not change section 7's substantive provisions," App. 36a, though the court failed to appreciate the significance of that fact. The clear import of the 1978 amendments therefore is that the obligation of an agency not to jeopardize a listed species remained simply a particular (albeit mandatory) aspect of the more generalized provision in the preceding sentence for agencies to "utilize their authorities" in furtherance of the Act's purposes.

The foregoing history is particularly significant in light of the events that precipitated passage of the 1978 amendments. Those amendments were enacted only a few months after this Court's decision in *TVA* v. *Hill*, *supra*, which construed the ESA to preclude operation of the Tellico Dam in Tennessee. See 437 U.S. at 156-158, 193-195. *Inter alia*, the 1978 amendments softened the practical effect of the decision in *Hill* by creating the Endangered Species Committee, which is authorized to grant exemptions from Section 7(a)(2)'s no-jeopardy mandate, see 1978 Amendments, § 3, 92 Stat. 3753-3760, and by directing the

Committee promptly to determine whether the Tellico Dam and Reservoir Project should be granted an exemption, see *id.* § 5, 92 Stat. 3761. Given that sequence of events, it is most unlikely that Congress chose simultaneously to *expand* the reach of Section 7's no-jeopardy requirement to require an agency to ignore a mandate in another Act of Congress. And it is altogether implausible to suppose that Congress intended to accomplish that result obliquely, by putting the phrase "utilize their authorities" in a separate sentence from Section 7(a)'s no-jeopardy and consultation requirements, without mentioning the change in the legislative history. Cf. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132-134 (2003) (declining to construe 1986 amendments to the False Claims Act as impliedly removing municipal corporations from the Act's coverage when such a change would have been contrary to the primary thrust of the 1986 legislation).[6]

c. The federal agencies charged with primary responsibility for the administration of the ESA have addressed the application of Section 7(a)(2)'s no-jeopardy and consultation requirements to agency conduct, like EPA's approval of Arizona's transfer application in this case, that is affirmatively mandated by some other provision of law. First, as noted above, a regulatory provision jointly adopted by FWS and NMFS provides that the relevant effects on listed species under Section 7(a)(2) are those "caused" by the agency's own action. 50 C.F.R. 402.02 (defining "effects of the action"). The effects of a statutory mandate are caused by Congress, not by the agency.

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[6] In 1979, Section 7(a) was further divided into subsections (1), (2), and (3). See Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226. Once again, however, that further subdivision made no substantive change. Accordingly, an agency's duty to "insure" that its actions will not jeopardize a listed species (and to engage in consultation to that end) continues to be limited to measures the agency might take to "utilize [its] authorities" under existing law. The 1979 amendments also added the final sentence of what is now Section 7(a)(2). See *ibid.*

Second, another regulatory provision adopted jointly by FWS and NMFS states that "Section 7 and the requirements of [50 C.F.R. Pt. 402] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). That rule reflects the longstanding view of FWS and NMFS that Section 7 channels federal agencies' exercise of existing authority and discretion, but does not supersede other legal constraints on agency conduct.

The construction of Section 7 of the ESA that is reflected in 50 C.F.R. 402.02 and 402.03 is reasonable and is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 703 (1995) (*Sweet Home*) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."). The court of appeals in this case quoted 50 C.F.R. 402.02 and recognized its parallel to the causation standard under NEPA as explained in *Public Citizen*, see App. 30a, but then reached a conclusion flatly contrary to this Court's analysis in *Public Citizen*. As for 50 C.F.R. 402.03, the court of appeals construed its reference to "actions in which there is discretionary Federal involvement or control" to encompass EPA's approval of Arizona's transfer application, on the ground that "EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application," App. 44a, even though EPA did *not* have discretion under the CWA to deny the transfer but was instead compelled to grant Arizona's application once the CWA criteria were satisfied. FWS and NMFS have since confirmed, however, that agency conduct mandated by another Act of Congress is not subject to "discretionary Federal involvement or control" within the meaning of Section 402.03. See pp. 25-26, *infra*; App. 103a-116a.

2. As the court of appeals acknowledged (see App. 44a-45a, 46a-47a; see also App. 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc)), the court's decision in this case conflicts with decisions of two other circuits, which have correctly held that the no-jeopardy requirement of Section 7(a)(2) of the ESA does not apply to agency conduct that is mandated by another federal statute.

a. In *Platte River Whooping Crane Habitat Maintenance Trust* v. *FERC*, 962 F.2d 27 (1992) (*Platte River*), the District of Columbia Circuit held that Section 7 of the ESA did not supersede limitations imposed by the Federal Power Act on the authority of the Federal Energy Regulatory Commission to amend existing licenses. See *id.* at 34. The court explained that the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Ibid.* The court specifically rejected the contention that *TVA* v. *Hill* supported a more expansive construction of Section 7, noting that this Court's decision in *Hill* "did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *Ibid.*; compare App. 32a (court of appeals in this case states that the decision in *Hill* "confirms [the court's] textual interpretation" of Section 7(a)(2)).

b. In *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (1998) (*American Forest*), the Fifth Circuit relied in part on *Platte River* in rejecting the argument that the ESA trumps the mandatory character of the CWA state-transfer provisions or supplants the CWA's criteria for approving transfers of authority. The court in *American Forest* considered the question whether EPA could condition a transfer of NPDES permitting authority to Louisiana on that State's agreement to consult with FWS and/or NMFS regarding impacts or endangered and threatened species before issuing permits under the CWA. See *id.* at 293-294, 297, 298-299. In holding that EPA could not

impose such a condition, the Fifth Circuit stated that "[t]he language of [33 U.S.C. 1342(b)] is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." *Id.* at 297. With respect to Section 7(a)(2) of the ESA, the court stated:

> EPA argues that ESA § 7(a)(2) * * * compels EPA to do everything reasonably within its power to protect endangered species. The flaw in this argument is that if EPA lacks the power to add additional criteria to [33 U.S.C. 1342(b)], nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.

Id. at 298. The court concluded that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction. The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA." *Id.* at 299.[7]

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[7] The Ninth Circuit's reliance (App. 45a-46a) on *Conservation Law Foundation of New England, Inc.* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife* v. *Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), is misplaced. In *Conservation Law Foundation*, the court upheld the denial of a preliminary injunction against a lease sale under the Outer Continental Shelf Lands Act (OCSLA). See 623 F.2d at 714-715, 719-720. The court observed that the ESA would apply to future exploration and production stages of the project, see *id.* at 715, but it did not address the proper resolution of any hypothetical future dispute in which Section 7(a)(2) of the ESA might be claimed to prohibit conduct that the OCSLA required. The court in *Defenders of Wildlife* held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides," 882 F.2d at 1299, and it concluded that particular EPA registrations of strychnine violated Section 9 of the ESA, see *id.* at 1300-1301. The court did not find a violation of Section 7(a)(2), however, nor did it suggest that the FIFRA *required* EPA to register the pertinent strychnine products. The court therefore had no occasion to address the

3. The court of appeals' decision raises issues of government-wide significance. Section 7(a)(2) applies to every "Federal agency," 16 U.S.C. 1536(a)(2), and the ESA defines that term to mean "any department, agency, or instrumentality of the United States." 16 U.S.C. 1532(7). As the court of appeals judges who dissented from denial of rehearing en banc observed, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." App. 78a n.4. The substantial practical implications of the court of appeals' decision reinforce the need for review by this Court.

4. The court of appeals also held that "EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." App. 23a. The court stated that a principal basis for FWS's finding that the transfer of permitting authority would not jeopardize listed species—*i.e.*, FWS's conclusion that the transfer decision was not the legal cause of any harm to the species because the transfer was mandated by Section 402(b) of the CWA—was inconsistent with EPA's antecedent determination that consultation was required

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interpretive issue presented in this case. In a subsequent decision involving the ESA, moreover, the Eighth Circuit observed that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority." *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 630 (2005) (citing, *inter alia*, *Platte River*).

Both *Conservation Law Foundation* and *Defenders of Wildlife* are thus fully consistent with the holding in *American Forest* that Section 7(a)(2) requires federal agencies "to channel their *existing* authority in a particular direction" but does not supersede contrary statutory commands. 137 F.3d at 299. But even if the court of appeals' understanding of *Conservation Law Foundation* and *Defenders of Wildlife* were correct, the conflict with the decisions in *Platte River* and *American Forest* would still warrant this Court's review.

by Section 7(a)(2) of the ESA. See App. 25a-26a. The court stated that, "[b]y relying on [the FWS BiOp's] line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult." App. 25a. The court explained that such a position would be contrary to the text of Section 7(a)(2) of the ESA, which "makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." App. 26a.

The court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand, but cf. *American Forest*, 137 F.3d at 298 n.6 (suggesting possible distinction between consulting obligations and substantive powers), and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply. The court was also correct that the course of agency proceedings in this case reflected a degree of confusion regarding the ESA's application to the NPDES transfer decision. EPA's prior uncertainty, however, does not cast doubt on the lawfulness of its ultimate decision to grant Arizona's transfer application, and the relevant federal agencies have since clarified their understanding of the legal principles that govern in this setting.

a. Section 7(a)(2) of the ESA states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That phrasing makes clear that "consultation" with FWS or NMFS is not an end in itself, but a means of ensuring compliance with Section 7(a)(2)'s substantive no-jeopardy mandate. Once it is confirmed that an agency is compelled by another federal law to engage in

particular conduct, without regard to the effect of that conduct on endangered or threatened species, Section 7(a)(2) of the ESA does not require the agency to engage in consultation concerning species-related impacts that it has no authority to prevent. Cf. *Public Citizen*, 541 U.S. at 767-769 (holding that, under the "rule of reason" implicit in NEPA, a federal agency is not required to prepare an EIS assessing the environmental impacts of an action that it is legally obligated to perform).

b. In and of itself, EPA's decision to initiate consultation with FWS concerning Arizona's transfer application was not inconsistent with FWS's ultimate determination that any harm to listed species that the transfer might entail was legally attributable to Congress rather than to EPA. Neither the ESA nor the CWA *prohibits* a federal agency from seeking the views of FWS or NMFS concerning the effects on listed species of conduct that the CWA requires, even though consultation in those circumstances would not serve its usual purpose of facilitating compliance with Section 7(a)(2)'s no-jeopardy requirement. And when an agency is uncertain whether the ESA's no-jeopardy mandate applies to particular conduct, consultation with FWS or NMFS is an appropriate means of resolving that question. See App. 73a (Kozinski, J., dissenting from denial of rehearing en banc).[8]

At both the beginning and the end of its consideration of Arizona's transfer application, however, EPA expressed the view that consultation concerning that application was required by the ESA. Thus, in soliciting comments on the transfer application, EPA described the no-jeopardy mandate of Section 7(a)(2) of the ESA and stated that "[t]he approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement." 67 Fed. Reg. at 49,919. And

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[8] In some cases, moreover, it may require significant analysis to determine whether a potential effect flows from a mandatory action or a related discretionary judgment.

in the *Federal Register* notice that announced EPA's approval of the State's application, the agency stated that "[i]ssuance of the biological opinion * * * concludes the consultation process required by ESA section 7(a)(2)." 67 Fed. Reg. at 79,630.[9]

The FWS BiOp did not discuss 50 C.F.R. 402.03, and it did not address the question whether the consultation that produced the BiOp was required by the ESA. The BiOp's no-jeopardy finding, however, was grounded in substantial part on FWS's conclusion that, even if Arizona's administration of the NPDES program proved to be less protective of listed species than the prior EPA regime, that disparity would not be "caused" by EPA's approval of the transfer, but instead would be attributable to "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." C.A. App. 224. Because Section 7(a)(2)'s consultation requirement is intended to facilitate compliance with the no-jeopardy mandate and therefore applies only to conduct that is properly attributable to the agency itself, FWS's causation analysis logically implies that consultation regarding Arizona's transfer application was not compelled by the ESA. EPA's failure at that time to recognize the full implications of FWS's causation analysis, however, does not cast doubt on the legality of the challenged transfer decision. FWS's analysis reflects a correct understanding of the causation principles that govern in this area, and it provides a fully sufficient basis for concluding that approval of

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[9] EPA had made similar statements in considering some prior state applications for transfer of NPDES permitting authority. See 64 Fed. Reg. 73,552, 73,554-73,555 (1999) (requesting comment on Maine application); 66 Fed. Reg. 12,791, 12,793-12,794 (2001) (approving the same); 63 Fed. Reg. 33,657-33,658 (1998) (requesting comment and approving public hearing on Texas application); 61 Fed. Reg. 65,047, 65,053 (1996) (approving Oklahoma application); *id.* at 47,932, 47,934-47,935 (requesting comment on Louisiana application). See also App. 7a-8a n.3.

Arizona's transfer application would not jeopardize any listed species. See pp. 11-13, *supra*.[10]

c. The relevant federal agencies recently clarified their positions concerning the applicability of Section 7(a)(2) of the ESA to EPA's NPDES transfer decisions under the CWA after the State of Alaska submitted an application for transfer of NPDES permitting authority. In connection with that application, EPA requested confirmation of its current view that, because Section 402(b) of the CWA requires that the State's application be granted if the CWA criteria are satisfied, the decision whether to approve the transfer is not subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. See App. 93a-102a. FWS and NMFS have confirmed that they share that understanding of the relevant statutory provisions. See App. 103-116a. FWS and NMFS have further confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the

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[10] Moreover, despite the government's reluctance to urge the court of appeals to rest its decision on the view that Section 7(a)(2) is altogether inapplicable to the mandatory transfer decision (and despite the Ninth Circuit's failure to accede to the government's request for further briefing on the subject if the Ninth Circuit reached the issue), there is no obstacle to this Court's review. Both the State of Arizona and private intervenors squarely raised the issue, and the Ninth Circuit squarely resolved it, so the issue was both pressed and passed on below. Of course, the Ninth Circuit need not have reached this issue at all and could have rested its decision on the inconsistency it found in the government's analysis of the consultation and jeopardy issues. This Court should at a minimum vacate the Ninth Circuit's judgment insofar as it goes beyond ordering a remand to the agency to resolve the inconsistency the panel discussed in Part III.B of its opinion, App. 23a-28a. But because the government has now resolved any such inconsistency and made clear that Section 7(a)(2) does not apply to the mandatory action at issue in this case for either consultation or no-jeopardy purposes (see pp. 25-26, *infra*; App. 93a-116a), the better course is for the Court to resolve that question.

CWA criteria are met, and EPA's approval is not the legal "cause," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See App. 105a-106a, 109a-110a, 114a-115a.

This Court has recognized that the Secretaries of the Interior and of Commerce are charged with primary responsibility for administering the ESA, and that their construction of ambiguous ESA provisions is entitled to judicial deference. See *Sweet Home*, 515 U.S. at 703-704; p. 18, *supra*. The recent FWS and NMFS communications regarding Alaska's pending transfer application reflect those agencies' considered interpretations of 16 U.S.C. 1536(a)(2), and of 50 C.F.R. 402.02 and 402.03, published regulations promulgated jointly by the two agencies in 1986 after notice-and-comment rulemaking. Because the responsible agencies have clearly stated their position that neither the consultation requirement nor the no-jeopardy mandate of Section 7(a)(2) of the ESA applies to EPA's consideration of state NPDES transfer applications, and because EPA's prior mistaken view that it was required to consult about Arizona's application does not cast doubt on the legality of the transfer decision challenged in this case, EPA's earlier misunderstanding on that point poses no obstacle to this Court's review of the Ninth Circuit's erroneous ruling. In light of the acknowledged circuit conflict and the broad significance of that ruling, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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